ciple, as well as the rule itself and the other reasons given in its support, ignore the fundamental principles which determine the nature of partnership obligations and the rights of partnership creditors. At law each partner is bound both to partnership creditors and to his separate creditors; either class may levy on his entire individual property for the entire debt, without priority over the other, and in equity he is likewise liable *in solido* for the partnership debts. The partnership creditor, moreover, has a paramount right to the firm property—a right derived from the unwaved lien of the debtor-partners, and not given to him as a matter of favoritism to creditors.[26] The separate creditors, on the other hand, have no such right at law as to the individual assets, nor is there any analogous foundation for such a right in equity. Their rights are against the property of their debtor alone, both at law and in equity, and although this includes his "interest" in the partnership, the value of this "interest" depends upon the amount of the partnership indebtedness. The two classes of creditors are in no sense on an equal plane, and any attempt to equalize their claims is to rob the partnership creditor of his legal right and to destroy the logical effect of the basic principles of the law of partnership. The true rule, then, is that the individual assets of the partners are to be applied to the partnership debts remaining unsatisfied by the partnership property *pari passu* with the separate debts of the partners. *Robinson* v. *Security Co.* (Conn.), 87 Atl. 879.

DISTRIBUTION OF EXTRAORDINARY DIVIDENDS AS BETWEEN LIFE TENANT AND REMAINDERMAN.—Where a trust fund consisting of corporate stock has been created, the income of which is to go to a life tenant with remainder over, much uncertainty has been shown by the courts in determining the rights of the parties as to extraordinary dividends. There are two widely differing American views:

I. According to the Pennsylvania or majority view, first clearly announced in Earp's Appeal,[1] the whole emphasis is laid upon the ascertainment of the period of time within which the surplus profits accrued, and all extraordinary dividends whether in stock, cash or scrip, earned prior to the date of taking effect of the trust, are, though not declared until after such date, part of the corpus of the trust fund to be held for the future benefit of the remainderman. All extraordinary dividends earned after such date are income and go as such directly to the life tenant. But the rule is in every case subject to the proviso that although the value of the trust fund may be reduced by business disasters to the corporation without giving the remainderman any rights in the ordinary dividends, yet the corporation cannot by means of extraordinary dividends take value

[26] Saunders *v.* Reilly, 105 N. Y. 12, 59 Am. Rep. 472; Case *v.* Beaureguard, 99 U. S. 119.

[1] 28 Pa. St. (4 Casey) 368.

from the trust fund and thus divert it from the remainderman to the life tenant, to the prejudice of the former. Accordingly if the intrinsic value of the shares constituting the trust fund be impaired in this manner, then to the extent of such impairment the remainderman has a right to have the extraordinary dividend added to the corpus of the fund.[2] Where the dividend was declared out of earnings accumulated both before and after the creation of the trust it must be equitably apportioned between the parties.[3] All dividends are presumed to be income and as such presumptively go to the life tenant, the holder of the stock.[4] The burden of proof is on the remainderman to show a decrease in value of the trust fund to entitle him to have the dividend apportioned.[5] In Pennsylvania in order to apportion the dividend properly the actual value of the corporate assets at the date the trust took effect must be compared with such actual value at the date the dividend was declared.[6] The mere comparison of the profit and loss account at the date the trust took effect with the same account on the date the dividend was declared is not sufficient.[7] The market value of the stock at these two dates is properly received as evidence but is not conclusive.[8] But in New Jersey the rule is different, and wherever proper, such apportionment must be made by comparison of the books of the corporation at the two dates.[9]

The cases have been decided largely on the basis of particular facts, in view of the necessity under the rule of preserving intact the corpus of the fund for the benefit of the remainderman. Thus in Wiltbank's Appeal,[10] the right to subscribe for new stock at par, and profits realized on the sale of such option was held income, since the issuance of the new stock caused no diminution in the value of the old. But later in the same court such right of subscription was held capital where the combined number of old and new shares approximately equalled in value the old shares.[11] And this is the generally accepted rule in view of the natural tendency of an increase

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[2] Earp's Appeal, *supra;* Appeal of Smith, 140 Pa. St. 344, 21 Atl. 438; Appeal of Boyer, 224 Pa. St. 144, 73 Atl. 320; In re Stokes' Estate (Pa. April 15, 1913), 87 Atl. 971; Cobb *v.* Fant, 36 S. C. 1, 14 S. E. 959; Pritchett *v.* Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064; Soehnlein *v.* Soehnlien, 146 Wis. 330, 131 N. W. 739; Miller *v.* Payne (Wis.), 136 N. W. 811; Goodwin *v.* McGaughy, 108 Minn. 248, 122 N. W. 6.

[3] Lang *v.* Lang's Ex'r, 57 N. J. Eq. 325, 41 Atl. 705; Day *v.* Faulks (N. J. Eq.), 81 Atl. 354; Ballantine *v.* Young (N. J. Eq.), 81 Atl. 119, and cases cited *supra.*

[4] Miller *v.* Payne, *supra;* Soehnlein *v.* Soehnlein, *supra;* Appeal of Boyer, *supra.*

[5] Appeal of Boyer, *supra.*

[6] Appeal of Boyer, *supra.*

[7] Appeal of Boyer, *supra.*

[8] Appeal of Smith, *supra;* In re Stokes' Estate, *supra.*

[9] Ballantine *v.* Young, *supra.* (To prevent great expense to the estate.)

[10] 64 Pa. St. 256, 3 Am. Rep. 585.

[11] Moss' Appeal, 83 Pa. St. 264, 24 Am. Rep. 164.

of capitalization to diminish proportionately the value of the original shares.[12] But the doctrine of Wiltbank's Appeal has been upheld where the dividend consists of the right to subscribe for shares in a stranger corporation.[13] A dividend declared out of the sale of a part of the original franchises and assets of the corporation is capital.[14] The same rule applies to dividends derived from mere enhancement in the value of the assets of the corporation,[15] and to mere enhancement in the value of the securities of stranger corporations held by it.[16] But there is a generally recognized exception to this in the case of joint stock companies organized for the purpose of buying and selling land. Here the shares are personalty, and if the capital be maintained unimpaired, the profits may be distributed in dividends, and the general rule of Earp's Appeal applies.[17] But losses to the corporation, resulting from defalcation of officers, which necessitate the assessment of stockholders, fall on the trust fund, and subsequent extraordinary dividends do not accrue to the benefit of the corpus merely by reason of such losses.[18] And where dividends are never distributed during the life tenancy, the increased value of the stock, due to earnings accumulated since the vesting of the trust, is capital and goes to the remainderman.[19]

II. The Massachusetts view, or the rule in *Minot* v. *Paine*,[20] holds cash dividends income, and stock dividends capital. This is largely a rule of convenience established for the guidance of trustees, but is based also on the theory that a stock dividend is but a permanent capitalization of the assets of the corporation, and that the old and new stock combined represent no more value than did the original shares.[21] In Georgia this rule prevails by statute.[22] No attention is paid to the fact that the earnings have been accu-

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[12] Re Eisner's Estate, 175 Pa. St. 143, 34 Atl. 577; Brown *v.* Brown (N. J. Eq.), 65 Atl. 739; Ballantine *v.* Young, *supra.*

[13] Re Eisner's Estate, *supra.* Here the new shares can by no possibility impair the value of the shares of the principal corporation.

[14] Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116.

[15] Miller *v.* Payne, *supra.*

[16] Thayer *v.* Burr, 201 N. Y. 155, 94 N. E. 604.

[17] Appeal of Merchant's Fund Ass'n, 136 Pa. St. 344, 20 Atl. 427. In this case the assets of the company (land) were of little value prior to testator's death, after his death copper was discovered thereon and the value of the land increased enormously. The discovery of the real value of the company's assets, subsequent to the vesting of the trust was held to be "earning" within the meaning of the rule in Earp's Appeal and the profits were adjudged to the life tenant.

[18] Miller *v.* Payne, *supra.*

[19] Re Connolly's Estate, 198 Pa. St. 137, 47 Atl. 1125.

[20] 99 Mass. 101.

[21] Minot *v.* Paine, *supra;* Daland *v.* Williams, 101 Mass. 571; Newport Trust Co. *v.* Van Rensslaer, 32 R. I. 231, 78 Atl. 1009; De Koven *v.* Alsop, 205 Ill. 309, 68 N. E. 930; Billings *v.* Warren, 216 Ill. 281, 74 N. E. 1050; Brown *v.* Aikin (Del. Ch. 1913), 82 Atl. 817; Kaufman *v.* Charlottesville, etc., Co., 93 Va. 673, 25 S. E. 1003; Gibbons *v.* Mahon, 136 U. S. 549.

[22] Jackson *v.* Maddox, 136 Ga. 31, 70 S. E. 865.

mulated since the vesting of the trust.[23] The obvious injustice of this rule in many cases, defeating as it so often does the intention of the creator of the trust, has caused the courts of Massachusetts to construe it as a rule of substance and not of form, under the well known maxim of equity. Thus where a corporation purchased with its earnings some of its own shares and later distributed these shares among the stockholders, this was held a cash dividend.[24] So where a corporation declared a dividend in stock of a stranger corporation.[25] Where part of the property of a corporation was taken by a municipality in a forced sale under the right of eminent domain, the cash dividend declared from the proceeds was held to be capital, as a mere conversion of the corporate assets from realty into personalty.[26] So where the affairs of a corporation were wound up and the proceeds distributed in cash.[27] Where a corporation issued a cash dividend to be used in the purchase of new stock, it was held to be a stock dividend.[28] But where a cash dividend was declared with option to purchase stock in a stranger corporation, it was held to be a cash dividend.[29] And the mere fact that a vote of increase of the capital stock and a vote of a cash dividend took effect on the same day, and that the amount of the cash dividend was just enough to enable each stockholder to pay for the amount of additional stock to which he was entitled to subscribe, did not make this a stock dividend, since the stockholder might subscribe or not as he pleased.[30]

LIABILITY OF PROMOTERS OF CORPORATIONS TO SHAREHOLDERS.—It is settled that promoters of corporations stand in a fiduciary relation to the corporation and that they cannot make secret profits while acting for the corporation.[1] As this relation is in most cases sustained towards the corporation only and not towards the subscribers for shares, any fraud of the promoter is usually an injury to the corporation, and the corporation is the proper party to seek redress.[2] There is, however, an exception to this rule that the cor-

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[23] Leland *v.* Hayden, 102 Mass. 542.

[24] Leland *v.* Hayden, *supra.*

[25] Gray *v.* Hemenway (Mass.), 98 N. E. 789; Union Trust Co. *v.* Taintor, 85 Conn. 452, 83 Atl. 697.

[26] Heard *v.* Eldredge, 109 Mass. 258.

[27] Gifford *v.* Thomson, 115 Mass. 478.

[28] Rand *v.* Hubbell, 115 Mass. 461.

[29] Gray *v.* Hemenway, 206 Mass. 126, 92 N. E. 31.

[30] Lyman *v.* Pratt, 183 Mass. 58, 66 N. E. 423.

[1] Fred Macey Co. *v.* Macey, 143 Mich. 138, 106 N. W. 722; Jordan & Davis *v.* Annex Corp., 109 Va. 625, 64 S. E. 1050; Erlanger *v.* New Sombrero Phosphate Co., L. R., 3 App. Cas. 1218; Dickerman *v.* Northern Trust Co., 176 U. S. 181 (*dictum*).

[2] Niles *v.* Ry. Co., 176 N. Y. 119, 68 N. E. 142; Meyer *v.* Bristol Hotel Co., 163 Mo. 59, 63 S. W. 96; Puritan Coal Mining Co. *v.* Pennsylvania Ry. Co., 237 Pa. 420, 85 Atl. 426; COOK ON CORPORATIONS, 7 ed., § 751.